

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

GABRIEL STELLATO, HANNAH BUCKLEY, REBEKAH COHEN, IMANI SCHULTERS, MIAH LATVALA, and MIKAYLA FALLON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

HOFSTRA UNIVERSITY,

Defendant.

No. 2:20-cv-01999-GRB-ARL

Judge Gary R. Brown

Magistrate Arlene Rosario Lindsay

DECLARATION OF JOSEPH I. MARCHESE IN OPPOSITION TO DEFENDANT'S MOTIONS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6) AND 12(c)

I, Joseph I. Marchese, hereby declare as follows:

1. I am a partner at Burson & Fisher, P.A., counsel of record for Plaintiffs in this action. I am an attorney at law licensed to practice in the State of New York, and I am a member of the bar of this Court. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, I could and would testify competently thereto.

2. I make this declaration in opposition to Defendant's motion for judgment on the pleadings.

3. Attached hereto as **Exhibit A** is a true and correct copy of the April 15, 2021 Hearing Transcript of Defendant's first motion for judgment on the pleadings, which was denied as to Plaintiffs' breach of contract claims regarding tuition and fees.

I declare under penalty of perjury that the above and foregoing is true and accurate.

Executed this 9th day of September 2021 at New York, New York.

/s Joseph I. Marchese
Joseph I. Marchese

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
GABRIEL STELLATO, et al., :
Plaintiff, : 20-CV-1999 (GRB) (ARL)
: April 15, 2021
:
v. : Central Islip, NY
:
HOFSTRA UNIVERSITY, GUERRA, :
:
Defendant. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE GARY R. BROWN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: DANIEL KUROWSKI, ESQ.
ELLEN NOTEWARE, ESQ.
ANDREW OBERGFELL, ESQ.
BENJAMIN ZAKARIN, ESQ.

For the Defendant: SUZANNE MESSER, ESQ.

Audio Operator:

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Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 THE CLERK: Calling case 20-CV-1999,
2 Stellato v. Hofstra University.

3 Counsel, please state your appearance for
4 the record.

5 MR. KUROWSKI: This is Daniel Kurowski for
6 the Stellato plaintiffs.

7 MR. OBERGFELL: Andrew Obergfell from Burson
8 & Fisher, also for the Stellato plaintiffs.

9 MS. NOTEWARE: Ellen Noteware from Berger
10 Montague, also on behalf of the Stellato plaintiffs.

11 MS. MESSER: Suzanne Messer, Bond, Schoeneck
12 & King, on behalf of the defendant.

13 THE COURT: Is that everybody? Okay.

14 So plaintiffs have lots of counsel. Who
15 will be taking the lead for the plaintiffs please?

16 MR. KUROWSKI: This is Daniel Kurowski. I
17 will be taking the lead for the Stellato plaintiffs.

18 THE COURT: Okay, excellent, thank you.

19 MR. ZAKARIN: My apologies, your Honor. I
20 think I may have -- this is Benjamin Zakarin on behalf
21 of the Migliore plaintiffs, of the Sultzer Law Group.
22 I may have mis-heard the clerk requesting appearances,
23 in which case I would say that I'm here on behalf of
24 plaintiff Migliore in the other matter.

25 THE COURT: Okay, excellent. Anybody else?

1 Last call before the gavel comes down. All right,
2 good.

3 I'm Judge Brown. We're here for a pre-
4 motion conference. We're doing this first of all via
5 audio conference because we find ourselves still in the
6 throes of a pandemic, which is preventing us from doing
7 this in the ordinary fashion, which would be in court
8 and better, but this will be good enough for today.

9 Second thing: We're here for a pre-motion
10 conference and everyone should understand that anyone
11 can make any motion they want but I also reserve the
12 right -- there's some noise in the background. Is that
13 something we can handle? Okay. If you're not
14 speaking, maybe you can mute yourselves. Thank you.

15 I reserve the right to construe the plea
16 motion letters along with the arguments of counsel as
17 the motion itself and decide the motion in whole or in
18 part. This is a procedure I've found very helpful
19 during these difficult times, in order to stay
20 consistent with Rule 1, which requires a certain level
21 of efficiency.

22 So let me start with the defendant because I
23 think it's your dime as they say. This will be your
24 motion so why don't you tell me what you'd like to tell
25 me about it please.

1 MS. MESSE: Thank you, Judge Brown. My
2 name is Suzanne Messer. I'm with the law firm of Bond,
3 Schoeneck & King, and I represent Hofstra in both of
4 these actions.

5 Just generally, and we have addressed this
6 in our pre-motion conference request letters, but the
7 crux of both of these cases is that the plaintiffs are
8 seeking refunds of tuition and fees that they paid to
9 Hofstra during the spring 2020 semester as a result of
10 Hofstra's transition to remote education because of the
11 pandemic and the mandatory shutdown orders issued by
12 Governor Cuomo. Both cases assert breach of contract
13 causes of action, unjust enrichment, and conversion
14 claims. The plaintiff in the Migliore matter is a law
15 student. The plaintiffs in the Stellato matter --
16 there's a number of them -- they are undergraduate
17 students and I believe one law student as well. So
18 that's sort of a general overview of the cases.

19 Hofstra is not distinct in these cases.
20 These cases have been brought against institutions
21 across the country and there are cases pending against
22 New York institutions in every district court in New
23 York right now.

24 THE COURT: Right. So what's the basis for
25 your claiming that these are subject to dismissal?

1 MS. MESSEY: Sure. With respect to the
2 breach of contract claim, New York law is very settled
3 in this area of higher education, and the relationship
4 between an institution and its students is contractual,
5 so we agree that there is a contractual relationship.
6 However, for a promise from an institution to a student
7 to be enforceable under New York law, it has to be a
8 specific promise for a specific service.

9 The basis for the breach of contract
10 dismissal is that there is no such allegation here of a
11 specific promise for in-person education, which is what
12 the plaintiff would like the terms of this contract to
13 be. The contract is instruction in exchange for
14 tuition and credit for that instruction. That is what
15 was provided in the spring of 2020, even after the
16 transition to remote instruction.

17 The governing documents for the institution
18 are the handbooks, catalogues, bulletins, and
19 circulars, and the plaintiffs simply do not cite to any
20 statement in those documents that create a promise for
21 in-person education. So for that reason, the contract
22 that they're alleging exists just simply doesn't exist.

23 THE COURT: Right but, counsel, let me stop
24 you for a second. I'm having a hard time wrapping my
25 head around the particular attack you're proposing to

1 mount on this complaint. In other words, if you said
2 to me, Judge, this is a defense of impossibility,
3 illegality, something -- it could be act of God,
4 whatever it is, I don't know and I haven't done the
5 research. I'd say that makes sense, right? None of us
6 were expecting Covid, right? But let's just sort of
7 cast our minds into a world where Covid didn't happen,
8 right, just as a hypothetical.

9 Things were going along ordinarily and you
10 had one student or one group of students who said, you
11 know what? You're banished from campus. You can't
12 come to campus but you can call in and listen to the
13 instructions on the phone. I think this lawsuit -- I
14 think there would be something to it, right? In other
15 words, the fundamental exchange here -- if you just
16 want to talk about whether or not there's a promise or
17 not, the fundamental exchange is, I'm paying money to
18 go to college and now I can't go to the college, I get
19 to see the college on t.v. That's a little bit
20 different.

21 MS. MESSER: Well, it certainly was
22 different, your Honor, but again, the terms of the
23 contract are what would control, and it has to be
24 specific promises. The promise that the institution
25 makes to its students is to provide instruction and

1 credit in exchange for tuition. That was done here so
2 we just respectfully disagree that this in-person
3 educational experience, which is what is alleged to be
4 the contract by the plaintiffs, isn't in fact the
5 contract, and it can be directly disputed by the
6 controlling documents.

7 In fact, that's what other courts in New
8 York have already done. The Columbia decision that was
9 cited in our pre-motion letter, the NYU decision, the
10 Fordham decision -- judges throughout the Southern
11 District of New York against various institutions have
12 dismissed these claims because there is no such
13 specific promise contained in the controlling
14 documents.

15 THE COURT: Okay. Is that it?

16 MS. MESSER: Well, then there is the --
17 there are various -- there are additional arguments in
18 support of and in opposition to that claim that
19 plaintiffs have raised in their letters, so I don't
20 know if you want to get into the details of addressing
21 those specific arguments at this point.

22 THE COURT: Counsel, I'll listen to anything
23 you want to tell me.

24 MS. MESSER: Sure.

25 THE COURT: But I just want to know, is that

1 the sole ground for the motion is a lack of a specific
2 promise that you can attend the school when you pay to
3 attend the school?

4 MS. MESSER: Sure. So that is step one.
5 There's no specific promise so the contract doesn't
6 exist. There was no breach of a contract because
7 remote instruction continued. Plaintiffs argue in
8 their letters that the fact that the institution did
9 offer some "online" or distance learning programs
10 somehow translates into the fact that if you did not
11 enroll in one of those online or distance learning
12 programs, you then -- there's some implied contract
13 that everything else was traditional and in-person
14 education.

15 Again, the NYU and Columbia courts have
16 dispensed with that very argument and said no. If
17 there is any contract for online education, perhaps a
18 student in that program can bring a breach of contract
19 action if the parameters of that program have not been
20 met. But simply the existence of those types of
21 programs does not translate into an argument or a
22 specific promise for in-person education for everyone
23 else.

24 The other issue that I'd like to raise with
25 respect to the breach of contract claims are the

1 disclaimers that are included in both the handbook and
2 the catalogues, both the undergraduate catalogue and
3 the law school catalogue that essentially allow Hofstra
4 -- reserve Hofstra's right to revise its educational
5 programs at any time. So that is also at play here in
6 this motion.

7 With respect to fees -- so there's the
8 breach of contract with respect to tuition, which I've
9 just addressed, and then there's a breach of contract
10 with respect to certain fees. The arguments are
11 essentially the same. These services were transitioned
12 to be offered remotely. There's documentation of that,
13 which can be considered on a Rule 12 motion to show
14 that there was no contract that the plaintiff is
15 alleging, and even if there was a contract, that it was
16 not breached. That can be decided on a 12 motion,
17 which is what we're asking to do.

18 Then there are a few other claims, which is
19 unjust enrichment and conversion. There's no unjust
20 enrichment claim here. We concede that there is a
21 contractual relationship. There's certainly a dispute
22 as to what the terms of that relationship are but
23 there's no -- unjust enrichment is simply duplicative
24 here, and that claim has been dismissed by all but one
25 court in New York who have looked at these cases on

1 Rule 12 motions.

2 And with conversion --

3 THE COURT: But the point there -- hold on,
4 let me stop you.

5 MS. MESSER: Sure.

6 THE COURT: Unjust enrichment and what was
7 the third claim you mentioned, sorry.

8 MS. MESSER: Conversion.

9 THE COURT: Conversion, yeah?

10 MS. MESSER: Conversion claim.

11 THE COURT: If the breach of contract claim
12 survives, then those two are definitely duplicative and
13 dismissed, yes?

14 MS. MESSER: Yes. Well, they should be
15 dismissed regardless but yes, unjust enrichment is
16 duplicative of the breach of contract. Contract
17 conversion is also a tort claim; it's duplicative.
18 Also, there's no identifiable (ui). Every single court
19 in New York that has decided these cases has dismissed
20 the conversion claim as well. So yes, all of those
21 claims are subject to dismissal. This would be a
22 motion that would address every single claim and we
23 could -- for that reason, we're also asking that
24 discovery be stayed during the pendency of the motion.

25 THE COURT: Okay. I mentioned those other

1 possible theoretical defenses earlier, you know, like I
2 sad, like an act of God, impossibility, illegality, and
3 so forth.

4 MS. MESSER: Right.

5 THE COURT: At what juncture would those
6 come up? They're not suitable for a motion to dismiss?

7 MS. MESSER: Well, they're not. They're
8 summary judgment decisions.

9 THE COURT: Okay.

10 MS. MESSER: The fact --

11 THE COURT: That's fine, got it. All right,
12 great.

13 Who would like to go first for plaintiffs,
14 please?

15 MR. KUROWSKI: Good afternoon, your Honor.

16 This is Daniel Kurowski for the Stellato plaintiffs.

17 THE COURT: What would you like to tell me
18 about this?

19 MR. KUROWSKI: I can respond in any way but
20 I always want to make sure that at the outset, if there
21 are any specific questions that your Honor has and
22 would like me to address before I go into my spiel, I'd
23 prefer to head in that direction. Otherwise, I'd be
24 glad to go through a point-by-point rebuttal.

25 THE COURT: Let me start with this. You'll

1 agree with me that if your breach of contract claim
2 survives, the unjust enrichment (ui).

3 MR. KUROWSKI: I would not, your Honor, in
4 part because of the nature of -- just because we have
5 alleged in-person education doesn't mean that
6 throughout the rest of the case, (ui) is going to
7 dispute that on a factual basis. The cases, when we
8 look at unjust enrichment, are in recognition that you
9 can have an unjust enrichment claim in this context,
10 where a defendant disputes that the contract covers an
11 in-person education. That's one of the reasons why
12 we've asserted that claim in the alternative such that
13 (ui).

14 THE COURT: Hold on, hold on. You're
15 hedging your bets in the sense that you want to tell me
16 this contract absolutely covers this situation and it's
17 a breach. But just in case you don't, then we're going
18 to rely on unjust enrichment, yes?

19 MR. KUROWSKI: In essence. What we're
20 saying is that the subject matter of the claim --

21 THE COURT: My point to you is -- right, but
22 if breach of contract survives, then unjust enrichment
23 I think gets dismissed. I think that's the most black
24 letter of all black letter principles, right? It's
25 done. It's not fair.

1 MR. KUROWSKI: I agree that it's not fair
2 and where it comes into play, your Honor, is we can't
3 ultimately recover under both. So we can assert it and
4 then the jury decides if we've proved our claim for
5 unjust enrichment. If not -- if the jury sides in our
6 favor, the unjust enrichment claim disappears, but
7 that's the appropriate time for the claim to go away.

8 THE COURT: No, no, no, no, wait. The cases
9 say that you don't submit both a breach of contract and
10 unjust enrichment to the jury. We have to figure it
11 out before that phase, don't you think?

12 MR. KUROWSKI: I think if your Honor is to
13 keep the breach of contract claim and deny a motion to
14 dismiss on that, there are cases that dismissed unjust
15 enrichment in that situation.

16 THE COURT: Okay, thank you. All right,
17 with that said, you can roll with your pitch.

18 MR. KUROWSKI: Thank you. With respect to
19 the point that defense counsel raised, we disagree with
20 all of them, your Honor, first with respect to the idea
21 that there's no specificity in our case. We think this
22 case is very much like another New York case that
23 denied claims in this context, and the case is Ford v.
24 Rensselaer Polytechnic Institute, and Ford is very much
25 like 36 other cases in this realm from courts across

1 the country at the state and federal level that have
2 recognized student Covid 19 litigation claims as
3 plausible. And very much like defendants in the other
4 cases, it's a very common argument for defendants to
5 say that plaintiffs haven't offered specific
6 indications or haven't cited to specific material that
7 requires or has a term for in-person education, and we
8 think that is just not the case here.

9 Looking to Hofstra's materials and the types
10 of documents that courts ordinarily consider to be
11 parts of the student/university relationship, we think
12 Hofstra made a number of bold claims about its in-
13 person programming and the benefits of an in-person
14 program and a variety of things. In the complaint, for
15 example, your Honor, we point to the university's
16 undergraduate bulletins and other documents that talk
17 about what defendant refers to as exclusively in-person
18 classes, which it distinguishes from distance-learning
19 classes. It charges different tuition rates for
20 entirely online versus entirely in-person classes as
21 well.

22 The university routinely recruits students
23 into its on-campus programs. It considers the
24 residential-living program as an integral part of the
25 total student experience. It identifies on-campus

1 resources, events, and services, and those are all
2 situations and services that, once the transition from
3 in person to entirely remote occurred, were services
4 and experiences that plaintiffs and the class members
5 were not able to access.

6 In our complaint, we also detailed through
7 another publication from defendant indicating, what
8 does your tuition cover? It says, your investment at
9 Hofstra University includes a variety of things that
10 are utilized for in-person experiences and access and
11 facilities and labs and materials. So we really do
12 dispute the concept or the notion that's being offered
13 by Hofstra here that we haven't alleged a specific
14 contractual term that in-person education is what the
15 parties bargained for here.

16 THE COURT: Let me -- let me press you on
17 that a little bit.

18 MR. KUROWSKI: Sure.

19 THE COURT: Because I am a little confused.
20 I mean, look, you know, I'm working off of your summary
21 of cases and counsel's summary of cases, and I haven't
22 done the research myself. But being somewhat familiar
23 with higher education, as we all are, right, there is
24 an enrollment agreement, right? There's actually an
25 agreement that you sign with the institution that says,

1 here's the deal, here's the tuition, here's this,
2 here's that. You're citing catalogues, bulletins,
3 campus tours, and I understand. And maybe I'll reverse
4 my view of this case and say that maybe the unjust
5 enrichment survives or the breach of contract does.
6 But my question is, what's the contract? Where is the
7 agreement between the students and the school?

8 MR. KUROWSKI: Sure. And the reason why we
9 cite to things like the bulletin and the course
10 catalogue and the university publications is because of
11 the way that New York law has treated the student
12 contractual relationship. So it's not a situation
13 where there is -- in like a traditional sense, where
14 you have a document that is the contract. So because
15 of that, New York law recognizes that it's an implied
16 contract and it's formed when the student -- when a
17 university accepts a student for enrollment and the
18 terms of the implied contract are contained in the
19 bulletins, circulars, and regulations made available to
20 the student.

21 That's the Second Circuit in the Pappalino
22 (ph) case, your Honor. That's why we focused on the
23 bulletins, circulars, and documents that we did cite in
24 our complaint. But you look at that as well, combined
25 with -- the totality of the objective manifestations of

1 the intent of the parties is expressed in their words
2 and deeds. We think when you look at the totality of
3 the situation and the circumstances which everybody
4 bargained for, it was for in-person education.

5 THE COURT: Well, you know, I'm going to --
6 let me just see something you described. Actually, I'm
7 going to go back to defendant for a second.

8 Let me ask defendant's counsel, what are you
9 saying to me is the agreement? Because I'm looking at
10 your letter and you're actually citing the handbook and
11 the bulletins.

12 MS. MESSER: Yes, yes.

13 THE COURT: So -- yeah.

14 MS. MESSER: I apologize, I didn't mean to
15 interrupt you.

16 THE COURT: What is the agreement?

17 MS. MESSER: Sure. So the agreement is
18 tuition in exchange for instruction and credit.

19 THE COURT: No, no, no, I mean where's the
20 contract? What am I supposed to read to decide whether
21 or not there's a promise of in-person instruction or
22 whether it's ambiguous on that point or it's absolutely
23 clear, as you're suggesting to me, that there is no
24 ambiguity and there was no promise? Because I'm sure
25 if I go through the catalogue, there's a promise of in-

1 person -- it's going to say something like, our
2 beautiful campus in Hempstead -- and by the way, if you
3 haven't been there, it is a beautiful campus, right?

4 MS. MESSER: It sure is.

5 THE COURT: Right?

6 MS. MESSER: Yes.

7 THE COURT: There has to be something there
8 that one could construe as a promise, unless you're
9 telling me there is a specific enrollment agreement
10 that students sign online or on paper that says
11 otherwise. So where is the agreement?

12 MS. MESSER: Sure. So the agreement, as New
13 York courts have defined the relationship, plaintiff's
14 counsel is correct, is the handbook, bulletin,
15 circulars, and catalogues. So the academic catalogue
16 here of Hofstra, of both undergraduate and the law
17 school, is really the document -- the handbook also
18 sets forth the terms of the student relationship, but
19 the catalogue sets forth how much tuition you're paying
20 for specific credits. You will not find in that
21 catalogue, the academic catalogue, that there is a
22 promise for in-person education.

23 What you're referring to, your Honor, is
24 some marketing materials and recruitment materials,
25 which do tout the benefits of being at this beautiful

1 campus in Hofstra. Of course, that's what Hofstra
2 would like to have occur at all times. But those are
3 marketing materials and they are not akin to documents
4 that can create a specific promise. The courts in the
5 Fordham, Columbia, and NYU cases have all made that
6 distinction and state that just because there are
7 benefits of being on campus, that does not translate
8 into the specific promise that New York courts require
9 in this type of relationship.

10 THE COURT: That's interesting. That's very
11 interesting. Wow, I thought this was going to be easy,
12 guys. You've made this hard. It's a job. Forgive me,
13 I recognize that there's another plaintiffs' counsel
14 that I have not yet heard from. Let me go to that
15 counsel and say, is there anything else you want to
16 add?

17 MR. ZAKARIN: Thank you, your Honor. This
18 is Ben Zakarin for plaintiff Matthew Migliore. I just
19 wanted to address a few points, counsel for the other
20 plaintiffs having addressed many of the ones I wanted
21 to call to your attention.

22 The statement of law on student/university
23 relationship refers to the rights and obligations in
24 the university's bulletins, circulars, regulations,
25 handbooks, catalogues, et cetera. And as counsel for

1 Hofstra just conceded, handbooks are indeed part of the
2 student/university contract because it sets out the
3 material terms of the relationship.

4 Counsel for Hofstra is saying that the terms
5 of the contract are tuition in exchange for
6 instruction. They haven't referred to any specific
7 documents stating that and they haven't referred to any
8 source for that term of that agreement. We would
9 argue, your Honor, that the terms are a little more in-
10 depth. But either way, what that does is create a fact
11 issue as to, what are the terms of the contract, what
12 are the parties' obligations and rights? That's a fact
13 question. Clearly, we've alleged sufficiently that
14 there are specific policies in the handbook that
15 entitle plaintiffs to in-person education.

16 I would draw your Honor's attention to the
17 distance-education policy --

18 THE COURT: Wait, I'm actually looking at
19 your complaint so that was good timing. So tell me
20 where I should look in your complaint.

21 MR. ZAKARIN: With respect to the distance-
22 education policy, paragraph 15, your Honor, sets forth
23 the policy, and paragraphs 16 through 20 explain the
24 meaning and effect of that contractual term.

25 THE COURT: All right, hold on. Am I

1 looking at the Migliore complaint? No, wait, yes?
2 Which complaint are you citing? Which complaint are
3 you citing?

4 MR. ZAKARIN: Migliore.

5 THE COURT: So I'm looking at Migliore.

6 Paragraph 13 says --

7 MR. KUROWSKI: Your Honor, I apologize, 15.

8 THE COURT: What?

9 MR. KUROWSKI: 15, your Honor, I apologize,
10 15.

11 THE COURT: Okay, I was confused. On March
12 8th, 2020, Hofstra Law announced that because of Covid
13 19 --

14 MR. KUROWSKI: Your Honor, my apologies.

15 Are you referring to the amended class action -- first
16 amended complaint, paragraph 15?

17 THE COURT: No, I was looking at the
18 original. I was looking at the original, hold on.
19 It's a little more complicated in the world of Covid to
20 find stuff. I don't have a big file in front of me.
21 It was easier. Hold on. So what docket entry is that?
22 Do you happen to know what docket entry it is? It's
23 docket entry 15, yes?

24 MR. KUROWSKI: Yes, your Honor.

25 THE COURT: Which is the amended complaint,

1 thank you. Okay, now I'm going to paragraph 15, yeah?

2 MR. KUROWSKI: Yes, your Honor.

3 THE COURT: Okay, that plaintiff and the
4 class contracted for in-person, on-campus instruction
5 is evident from Hofstra's law and distance-education
6 policy. It defines distance education as a process
7 characterized by separation. Okay, where do you allege
8 that this isn't what applies to your situation?

9 MR. KUROWSKI: No, your Honor, we allege in
10 fact that this policy did apply. And in fact,
11 plaintiff and students at Hofstra Law affirmatively
12 agreed to the distance-education policy, which
13 expressly would have -- expressly, number one,
14 prohibited them -- and Hofstra students agreed to this
15 contract term, that they prohibited them from enrolling
16 in any distance-education course, anything not in
17 person, live.

18 THE COURT: How?

19 MR. KUROWSKI: It prohibited them before
20 they completed 28 credit hours, which would be the
21 first year.

22 THE COURT: Hold on, hold on, hold on.
23 That's kind of a huge leap, right? In other words,
24 what you're saying to me is that the handbook has a
25 distance-education policy that says, you won't do it

1 this way unless you first complete 28 credit hours,
2 right? That's what it says. It doesn't say, we
3 promise you that it's going to be, you know, taught at
4 the wonderful facility. It just says, you can't do
5 this unless you've first completed 28 hours, yeah?

6 MR. KUROWSKI: Well, your Honor, yes, but I
7 would argue that it says -- that creates an obligation
8 on the part of Hofstra to provide students courses to
9 meet their minimum 12-credit-hour-per-semester class,
10 you know, course work.

11 THE COURT: I am relying on your
12 characterization of the document. You don't quote it,
13 right? I don't think it's attached. And if that's the
14 best you can do on a characterization, boy, that's
15 pretty far. Do you have anything else in here?

16 MR. KUROWSKI: Your Honor, I apologize for
17 my characterization because the way --

18 THE COURT: No, no, counsel, I'm not saying
19 you. I'm saying the complaint doesn't quote or cite
20 the handbook. It just is generally characterizing what
21 it says. If this characterization is the best you can
22 do, it sounds pretty far from a promise.

23 MR. KUROWSKI: Well, your Honor, I would say
24 that I think it's actually discussed fairly at length
25 throughout -- all the way through to 20. We did

1 include the hyperlink to it in the complaint. The
2 point is this: The policy's importance is that,
3 essentially, students were -- students contracted with
4 Hofstra for instruction of some kind -- the parties
5 agree on this much: Students contracted with Hofstra
6 for instruction of some kind in exchange for tuition.
7 Plaintiff insists that it was in-person instruction --

8 THE COURT: Counsel, imagine for a moment
9 that you don't have me on that point, right? I just
10 don't see it. Are there other allegations in this
11 complaint, in this amended complaint, that will point
12 me to contractual promises?

13 MR. KUROWSKI: Are there other allegations
14 in here? Well, your Honor, I would note that we do
15 address the difference between -- and this was not an
16 argument we intended to rely upon -- the difference
17 between tuition and -- between online and on-campus
18 programs. I'd also note that Hofstra Law advertised
19 its campus as being essentially to the Hofstra Law
20 experience.

21 THE COURT: Counsel, what you're saying to
22 me -- what you're saying to me about things like that,
23 I so hear you on this. I would say that if you're
24 trying to defend the unjust enrichment piece, right,
25 that's like a home run. That knocks it out of the

1 park. But I'm looking for a breach of contract and I'm
2 not seeing it immediately.

3 MR. ZAKARIN: Your Honor, you'll forgive me
4 for a little bit of nerves. I would appreciate the
5 opportunity to better restate the argument with respect
6 to the policy we were previously discussing, and then I
7 would be happy to move on to the unjust enrichment
8 because I think --

9 THE COURT: No, no, no. Counsel, I'm
10 looking at the complaint. Just help me find it, right?
11 In other words, show me where you allege and how you
12 allege -- because today is all about the allegations,
13 right? I have to look and see if you have alleged a
14 plausible claim. So show me where in the complaint --
15 and I'm going to give your co-counsel a chance to look
16 at the complaint and do the same thing. Show me where
17 you've alleged a contractual promise that was breached.

18 MR. ZAKARIN: The actual promise of on-
19 campus education is referenced in 19, not quoted from
20 anything but all students, all students past 28 credits
21 at Hofstra still could only enroll in up to 4 credits
22 per semester of distance education. That means not
23 just, as your Honor said, Hofstra is saying, well, you
24 can't do this until you get the 28 credits. What
25 Hofstra is saying is, for the between 12 and 17 credits

1 that you're required to take every semester, you may
2 not take any more than 4 credits by this alternative
3 means. And Hofstra refers to that as programs beyond
4 traditional classroom -- beyond traditional classroom
5 programs in their handbook.

6 THE COURT: Okay, all right, good. What
7 else would you like to say?

8 MR. ZAKARIN: Well, your Honor, with respect
9 to unjust enrichment, I would also note that I agree
10 with counsel for the Stellato plaintiffs that the
11 subject matter is critical for an unjust -- whether or
12 not the contract addresses the subject matter at issue
13 in the breach of contract claim is dispositive. So
14 were the Court to determine that there were a viable
15 allegation for breach of contract for failing to
16 provide in-person education consistent with the Hofstra
17 students' rights and obligations under the parties'
18 agreement, then it still would not be appropriate to
19 dismiss it because we would -- the Court would still
20 need to determine the terms of the contract and whether
21 or not it did cover that subject matter.

22 THE COURT: I get that, I get that. I'm
23 more troubled by that but let me go to your colleague
24 for a moment.

25 Co-counsel, could you tell me in your

1 complaint, which I'm trying to pull up -- by the way,
2 are we working with your original complaint or an
3 amended complaint in Stellato?

4 MR. KUROWSKI: Sure. In Stellato, we have a
5 consolidated complaint, your Honor. It's at docket
6 number 17.

7 THE COURT: You know what I like about that?
8 It's something different. I said amended or original
9 and you said no, consolidated. Okay, that's great.

10 MR. KUROWSKI: There were originally three
11 cases and they were combined into the one, your Honor.

12 THE COURT: Beautiful. I like combining
13 cases. That's all good. Thank you for that. So now
14 I've just pulled up your complaint.

15 MR. KUROWSKI: Sure.

16 THE COURT: And I don't know if it mirrors
17 the complaint in Migliore or not, but can you point me
18 to paragraphs where you allege contractual terms,
19 contractual promises that were violated by what
20 occurred?

21 MR. KUROWSKI: Sure, exactly. I'd direct
22 your Honor to our complaint, starting for example at
23 paragraph 38. In that paragraph, we kind of challenge
24 one of the contentions made by Hofstra here that oh,
25 these are marketing-type issues that Hofstra has -- or

1 marketing-type assertions or promises that Hofstra has
2 made, they're not contractual promises. We challenged
3 that starting in 39 and describe the various promises
4 of on-campus instruction and access to the facilities
5 and resources that we allege were part of the
6 contractual agreement here.

7 So again, in paragraph 39, we're turning to
8 the student handbook. This defines how we contend that
9 the publications set out what students receive in
10 exchange for paying tuition and fees. We allege that
11 paying for tuition and fees is more than just the
12 opportunity to receive credits. As recognized in
13 another New York case that I had mentioned before, the
14 Ford v. Rensselaer case, tuition may be payment for
15 instruction but the defendant can hardly deny that
16 there's more to the contractual relationship than such
17 a limited argument would suggest.

18 So 39 -- in 40, we describe for example
19 class schedules, setting out the in-person nature of
20 the classes, indicating the location where the classes
21 were held by buildings, room numbers, days offered,
22 start and stop times. In addition, 41 further supports
23 our allegations of an in-person agreement, where
24 there's on-campus resources available to individuals as
25 well in-person events and services in 42.

1 Again, 43 talks about the library facilities
2 and -- facilities. 44, services that are all part of
3 things that we allege tuition pays for, and we allege
4 that Hofstra breached when it shifted the entire campus
5 to remote --

6 THE COURT: I'm looking at 46, right, which
7 is --

8 MR. KUROWSKI: 46, yes.

9 THE COURT: What is that an excerpt from?
10 This is the admissions section of the website. Is the
11 website part of the agreement? That's another
12 question, right?

13 MR. KUROWSKI: That falls in -- it's not --
14 we would say it is reflective of the agreement because
15 this is a publication and a number of courts recognized
16 that a publication, the university's publications help
17 define and recognize what the students' expectations
18 are, what their reasonable expectations are under a
19 contract.

20 THE COURT: Counsel, I'm actually just
21 pushing a little bit harder than I need to because you
22 covered it, right? You have the bulletin stuff in here
23 and you have the handbook stuff in here, which is
24 clearly part of the agreement, and there are numerous
25 references to in-person instruction, right?

1 MR. KUROWSKI: Exactly, your Honor, and I
2 think when you loop it back to what we've alleged and
3 what the stage of the case is here -- because as your
4 Honor had mentioned earlier, we're kind of taking what
5 we've alleged as true, and I think there are a few
6 guiding principles that press the scale, even if
7 there's a factual dispute as to whether the contract
8 covers in-person education or not.

9 I think, one, under Second Circuit, for a
10 breach of contract claim, we're now talking about a
11 particularity requirement of Rule 9(b), so we have to
12 kind of still look at our --

13 THE COURT: I hear you.

14 MR. KUROWSKI: -- analysis in that sense.
15 Again, ultimately, if there's -- I think our burden at
16 the pleading stage is slight, so --

17 THE COURT: I understand that --

18 MR. KUROWSKI: -- relatively simple
19 allegations will allege a breach of contract claim
20 here.

21 THE COURT: Right.

22 MR. KUROWSKI: And we submit that that's
23 what we've done here.

24 THE COURT: Counsel, it's interesting
25 because early on, I brought up the notion of unjust

1 enrichment and the concern that it could be duplicative
2 and you rightly zealously defended your position. But
3 as I think about it, if what we're talking about is the
4 worldwide pandemic, which has essentially shut down the
5 face of the planet for a long time that no one
6 anticipated and no one caused, what good are equitable
7 claims anyway, right? In other words, there's no way
8 you could overcome -- I mean, there was nothing
9 untoward on the part of the university. They didn't
10 cause the pandemic, right, and they had to follow the
11 laws and whatnot. So your breach of contract claim is
12 actually stronger from that perspective. Is that fair?

13 MR. KUROWSKI: It is, your Honor, but I
14 think one of the important things to keep in mind with
15 respect to an unjust enrichment is, you don't have to
16 have any wrongdoing in order to --

17 THE COURT: Yeah.

18 MR. KUROWSKI: So there's no requirement
19 that --

20 THE COURT: But it is equitable, right? And
21 once you get to that equitable balancing, I can't
22 imagine that what actually happened doesn't come in and
23 sort of wipe out any inequity, you know?

24 MR. KUROWSKI: Sure, right. And I think,
25 again, looking at the case law here from having

1 considered this in other cases, whether these kind of
2 equitable principles -- ultimately, with unjust
3 enrichment, what's required is that the defendant can't
4 retain the benefit to plaintiffs' detriment, in
5 violation of fundamental principles of justice, equity,
6 and good conscience. I think ultimately, those are
7 going to be questions of fact. So even if it was
8 nobody's fault, that's going to be a question of fact
9 for a later date.

10 THE COURT: Wow, okay. I'm going to go back
11 to defendant's counsel.

12 Assume for the purposes of my conversation
13 only -- of my question only that I agree with you -- I
14 may agree with you that in the Migliore case, the
15 breach is not adequately pled. If that's the case and
16 it's subject to dismissal, what would be your
17 suggestion as to the bases or basis for dismissing the
18 unjust enrichment and/or the conversion claim in that
19 case. I'm talking about Migliore right now.

20 MS. MESSEY: Sure. I do want to add just a
21 little more favor to the distance-learning policy
22 because New York State, as you know, has requirements
23 about the eligibility for taking the bar exam. The
24 distance-learning policy that's cited in the handbook,
25 those are the New York State requirements for the

1 hybrid classroom and clerkship program that New York
2 State allows law students to undertake. So in order to
3 be eligible to take the bar exam without going through
4 the traditional three years of law school, you can also
5 do sort of a hybrid plan, and that's set by the court
6 of appeals. It's in the court of appeals rules. So if
7 you were to refer to those rules, which of course we
8 cite in motion papers, that distance-learning policy is
9 not a Hofstra-created policy. It's a court of law
10 examiner's policy.

11 THE COURT: Right.

12 MS. MESSEY: So that's really what the
13 purpose of that policy is. I agree with you that the
14 breach of contract is not adequately pled.

15 Moving on to unjust enrichment, Judge, you
16 hit the nail on the head. I mean, higher ed is -- they
17 didn't benefit from having their students move off of
18 campus. They incurred additional costs to transition
19 to remote education, technological costs, costs to
20 assist students in moving off of campus when they had
21 to, costs to assist students to continue on with their
22 education during the pandemic, whether that be in the
23 form of emergency aid or assistance for housing or
24 assistance for food or assistance for technology that
25 these students needed in order to move on in their

1 education and continue their education through the
2 spring term. So the balance of the equities here --
3 you're not going to be able to find, you know, that
4 Hofstra benefitted, financially or otherwise.

5 In fact, you'll see in a lot of
6 institutions, you know, cuts in salary for the
7 administrators because what they're doing is trying to
8 shift resources to student aid. You'll also see here
9 that everything that was available on campus, to the
10 extent it was possible to transition such things to
11 remote education/remote experiences was done so. So
12 for example, career services, counseling services,
13 health services. In fact, programming increased during
14 the spring 2020 term to attempt to enable these
15 students to have access to more services that they may
16 need and to keep them connected to the Hofstra
17 community.

18 So there is no unjust enrichment here. The
19 balancing of the equities is not going to come out in
20 favor of the students versus the institution. This is
21 not an ideal situation for anybody, and the institution
22 did what it could to enable that educational experience
23 to continue.

24 Conversion, again, that claim has not
25 survived any motion in New York, and the reason is

1 because once -- the rational behind dismissal is that
2 once the student pays their tuition, it doesn't remain
3 an identifiable fund. The fund is disbursed throughout
4 the university's revenues, expenses, and is no longer
5 identifiable. Therefore, for those reasons, it would
6 be dismissed regardless.

7 Your Honor reviewed the Stellato complaint
8 and if I could just make a couple of questions about --
9 a couple of comments about that. There are references
10 to the bulletin with respect to this in-person -- this
11 in-person phrase. But I just want to be very clear
12 that the references that were discussed, for example
13 paragraphs 40 and onward, are not for in-person
14 instruction. They're just not. They are for --

15 THE COURT: Wait, wait, wait, they're for
16 in-person facilities, yeah?

17 MS. MESSER: Well, so for example -- so one
18 of them is referencing career services.

19 THE COURT: Right.

20 MS. MESSER: Again, those career services
21 were transitioned to remote instruction. And if you
22 read the bulletin, what they say is, we have one-on-one
23 advising services, we have in-person and online
24 workshops, we have field trips, things of that nature.
25 So what happened was, these things were transitioned to

1 a virtual setting. And the court in Columbia and in
2 Fordham recognized that yeah, okay, these are benefits
3 that you're meant to have once you're going to college
4 but they are not specific promises for particular
5 services, and that's the same here.

6 The fact that -- the course schedule that is
7 quoted and cited, this is a theme we see in these
8 cases. All of these institutions have these search
9 explorer websites that allow you to search for classes.
10 Of course, once the schedule is set, they get a
11 schedule that tells them where to go. But the courts
12 have unanimously said in New York that have dismissed
13 these claims that this is information. These are
14 search tools. This does not create a specific promise
15 that things will always be done in this way.

16 THE COURT: Right, but --

17 MS. MESSER: So I just wanted --

18 THE COURT: Counsel, in fairness, though, if
19 you do compare it to the cost schedule for distance
20 learning, which was lower I believe based on the
21 allegations here, right, and actually, common sense
22 would tell me the same thing --

23 MS. MESSER: Um --

24 THE COURT: No, go ahead. Tell me if I'm
25 wrong.

1 MS. MESSER: In fact, it's not the same
2 thing. Again, I'd refer back to my initial discussion
3 of this online versus in person. There are certain
4 programs that have traditionally been offered online.
5 They're offered at a lower rate because they're
6 fundamentally different than what happened, you know,
7 than the normal way of doing things. They're also
8 fundamentally different than what happened in spring of
9 2020.

10 These online programs are asynchronous-type
11 courses. They're not synchronous courses. Again, just
12 because certain programs were promised to be online
13 does not translate into a promise that everything else
14 will be done in a particular modality. That is quite
15 the leap, as your Honor has recognized. So it just
16 doesn't translate, and what happened -- the programming
17 is just fundamentally different. It's a comparison of
18 apples and oranges.

19 THE COURT: Right. But, counsel, you would
20 agree with me that but for the intervention of Covid,
21 right, this would be the biggest bait-and-switch in
22 history, right? Come on, it just is.

23 MS. MESSER: Sure.

24 THE COURT: You would pay less for an online
25 course. You know what I mean? You're not going to

1 Hofstra, you're going to the University of Phoenix so
2 you do it online. It's different.

3 MS. MESSEY: Yes. And, you know, your
4 Honor, if you were to talk to some of these folks that
5 run Hofstra about the University of Phoenix, they can
6 give you their opinions on those things. And there are
7 cases in fact, Judge, where there has been a breach of
8 contract found, where for example, a facility was
9 promised and people arrived on campus and that facility
10 wasn't there, okay? So, unfortunately, these things
11 have happened, but that is not what happened here.

12 Plaintiffs can't plausibly allege such a
13 thing and, you know, you do have to look at it in the
14 context of what actually happened. And what happened
15 was, we took these courses that everyone would have
16 loved to have been able to continue in the way that
17 they have been going on, and we did the best we could
18 to transition those. These students completed their
19 courses, they got their credits. They were entitled to
20 programming and they received programming. Hofstra
21 fulfilled its obligations to its students. It went
22 above and beyond to do so.

23 THE COURT: Counsel, I'm sympathetic -- I'm
24 empathetic, right? By the way, it's no secret and if
25 anybody has an objection, you'll let me know. I am

1 actually an adjunct professor at St. John's, right, so
2 I've done this and I understand all of this. Actually,
3 let me just put that out there. If anyone thinks I
4 should recuse myself, you just raise it now. Is there
5 any issue on that?

6 MS. NOTEWARE: I'm sorry, this is Ellen
7 Noteware. I don't know if you mis-spoke. You said St.
8 John's. Are you saying Hofstra?

9 THE COURT: No, no. If I worked for
10 Hofstra, I'm off, forget it.

11 MS. NOTEWARE: Okay.

12 THE COURT: I teach at St. John's. I'm just
13 saying that as a professor, I understand -- as a part-
14 time professor, I understand the difficulties and I
15 understand the difference between in-person and online
16 instruction. I'm just saying that. But if anybody has
17 a problem with that, just say, Judge, you know too much
18 and I'll get off the case. You tell me.

19 MR. ZAKARIN: No, your Honor, for Migliore
20 plaintiffs. No objection.

21 THE COURT: Stellato, are we good?

22 MR. KUROWSKI: Your Honor, subject to any
23 additional thoughts from my co-counsel, Mr. Obergfell
24 and Ms. Noteware --

25 THE COURT: Are your co-counsel here? They

1 can speak.

2 MR. KUROWSKI: They are, exactly. My
3 perspective is, your Honor, since you're not a
4 professor at Hofstra, ethics rules would not require
5 you to recuse yourself.

6 THE COURT: Excellent, thank you. I don't
7 think it's a problem but I just wanted to make sure.
8 Okay. So that said, we all have experience. We know
9 what happened in the last year, right? Life changed in
10 many, many ways. I hear all that. This is really
11 complicated.

12 Let me go back, but I think I have -- I
13 think I know a solution for now. Let me go back to
14 counsel for the Migliore plaintiffs and ask you this:
15 If I compare your complaint to the complaint in
16 Stellato, you have not laid out the same level of
17 detail as to what the handbook promised and that sort
18 of thing. But then again, you're doing it with a
19 different school. So my question would be, if you had
20 an opportunity to amend yet again, could you allege
21 more details or is what you have it?

22 MR. ZAKARIN: Your Honor, thank you. I
23 believe that, given the opportunity to amend -- I'm
24 confident that given the opportunity to amend, we could
25 more sufficiently allege -- I would note, though, that

1 in the complaint as written, your Honor -- I would
2 direct your Honor's attention to the point raised in
3 paragraph 18, which is talking about the concept of
4 non-classroom courses, under which distance education
5 classes fall. This is not -- this is not merely
6 setting a limit on when you -- at what point you can
7 take a course that's online.

8 THE COURT: Right.

9 MR. ZAKARIN: It's saying -- Hofstra is
10 specifically saying, students, you have the right to
11 take between 12 and 17 credit hours per semester. You
12 have the right to take no online courses your first
13 year. You have the right to take one online course
14 your second or third year, more than one online course
15 per semester. Hofstra is therefore obligated, if
16 they're required to provide instruction -- it's a
17 pretty clear implied term that Hofstra is obligated to
18 provide instruction sufficient to satisfy its own
19 policies.

20 THE COURT: Right. I hear you, counsel, but
21 let me say, if I read the Stellato complaint, right,
22 there are allegations in there that say -- and I don't
23 have it in front of me but in sum and substance, come
24 to the football games, meet your advisor in person.
25 They have many more details. My suggestion to you is,

1 I'm going to guess -- I don't know but if you go
2 through the handbook and the -- there probably are
3 similar details but I don't know, maybe there's not.

4 MR. ZAKARIN: Yes, your Honor, and we
5 mentioned those specifically. On the website targeted
6 toward law students, Hofstra says, Hofstra Law is
7 situated on a 240-acre Hofstra campus, providing law
8 students access to resources available throughout the
9 community. The campus is a bustling environment of
10 theatrical performances, concerts, sporting events,
11 lectures --

12 THE COURT: Wait, wait, wait, what are you
13 reading from right now? What are you reading from?

14 MR. ZAKARIN: Paragraph 29 of the first
15 amended complaint, your Honor.

16 THE COURT: Okay, hold on, hold on, I'm
17 sorry. I'm doing this electronically and it's really
18 hard to keep everything up on the screen at the same
19 time, so I will go back to that, one second.

20 MR. ZAKARIN: (Ui), your Honor.

21 THE COURT: You see, you're not even getting
22 in-person judges. It's just terrible. There's all
23 kinds of problems. This was your amended complaint,
24 which was 15. Hold on. Got it. Okay, tell me what
25 paragraph we're looking at again?

1 MR. ZAKARIN: 29, your Honor.

2 THE COURT: 29. This is the website,
3 though, right? Is the website part of the contract?

4 MR. ZAKARIN: I would argue as counsel for
5 Stellato that it's a question of publications. I'd
6 argue that is a publication.

7 THE COURT: I hear you. I'm a little bit
8 more concerned is, I think someone said, reflective of
9 the agreement in some ways but not the agreement
10 itself. So it's almost like if the agreement were
11 ambiguous, we'd have to look at it. You know what I
12 mean? It's just so hard because the four corners of
13 the agreement -- it's not clear to me where those four
14 corners end, you know?

15 MR. ZAKARIN: Well, your Honor, I think
16 that's an important point, that having all agreed that
17 these documents supply the terms of the parties'
18 agreement, there's still apparently a question as to
19 what the precise terms of the agreement are. Plaintiff
20 Migliore alleges that based on the policies he
21 affirmatively agreed to and his rights under the
22 student handbook, Hofstra was obligated to give him the
23 opportunity to satisfy the policies. These are things
24 that they affirmatively agreed to. I can tell you for
25 sure that the Hofstra Law student handbook is available

1 online.

2 THE COURT: Right, but the student handbook
3 -- but this is not the student handbook you're saying.
4 Are you?

5 MR. ZAKARIN: No, I'm not saying the student
6 handbook but the student handbook also does make
7 reference to various on-campus resources for law
8 students, including the law library --

9 THE COURT: It's not alleged, though, right?

10 MR. ZAKARIN: That wasn't specifically
11 identified in the complaint, your Honor, no.

12 THE COURT: Counsel, please understand, what
13 I'm talking about right now here is just what's in
14 front of me. I don't want you to walk away thinking,
15 gosh, the judge is criticizing me because my complaint
16 wasn't as good as the other one. This is hard,
17 creative advocacy you're doing here. This is very
18 difficult. It's new to all of us, right? So no fault,
19 right, is what I'm saying, okay? And I'm just asking
20 that, if given the opportunity to amend, there would be
21 other things you could add. Fair?

22 MR. ZAKARIN: Yes, your Honor, there would
23 be other things we could add.

24 THE COURT: Okay, that's what I needed to
25 know. All right, I think I know what I need to do

1 here.

2 Anyone else want to add anything else?

3 MR. KUROWSKI: Your Honor, this is Daniel
4 Kurowski for the Stellato plaintiffs again. I think in
5 terms of a potential opportunity for handling how to
6 proceed with the Stellato case, I think it helps to
7 have a little bit more background in terms of the two
8 cases.

9 Our case was the first filed case and we
10 have an appointment under Rule 23(g), appointing my
11 firm as well as Burson & Fisher and the Berger Montague
12 firm as interim, co-lead counsel for the cases.

13 THE COURT: Okay.

14 MR. KUROWSKI: Our case includes a law-
15 student plaintiff and our case is broader than the
16 Migliore case. The class definition in that case
17 limits it to law students. Our case includes law
18 students in addition to the undergraduate --

19 THE COURT: Counsel, I'm laughing only
20 because -- counsel, I'm only laughing because just when
21 I thought it couldn't get more complicated.

22 MR. KUROWSKI: And my suggestion would be,
23 your Honor, that what we could do because our case is
24 the broader case, staying the case as a later-filed
25 case is another option that we'd suggest would be

1 appropriate here until sort of the issues covering law
2 students, too, are dealt with in our broader Stellato
3 case. It would be another alternative available.

4 THE COURT: I hear you. I think I have a
5 different way of doing it but -- I'm trying to be fair
6 to everybody here but I'm good. Anything else?

7 MS. NOTEWARE: Yes, your Honor. This is
8 Ellen Noteware for the Stellato plaintiffs as well.
9 Going into the background, also, defendants answered
10 our complaint. We served discovery that they have not
11 answered. They asked for an extension and then they
12 filed the pre-motion -- started the pre-motion process.

13 THE COURT: Yes.

14 MS. NOTEWARE: So we haven't gotten
15 discovery and we don't want to drag this out. I
16 understand these are very complicated issues but many
17 courts around the country and in New York, Pace, RIT,
18 RPI, Cornell -- many courts have allowed these cases to
19 go forward and are in discovery. We don't want to keep
20 pushing this down the road with more motion practice
21 and all of that.

22 THE COURT: I hear you. Let me say, that's
23 my favorite question of the day. Do you know why?

24 MS. NOTEWARE: I do not.

25 THE COURT: Because I refer all discovery

1 matters to the magistrate judge.

2 MS. NOTEWARE: Right.

3 THE COURT: So for discovery, see Judge
4 Lindsay because she's terrific. She really is. I used
5 to be a magistrate judge. I love the way we use
6 magistrate judges. So I understand your point and
7 that's why I'm trying to resolve this today and not do
8 months of briefing and writing and whatever. As
9 interesting as these issues are -- counsel, I say this
10 to everyone. You've raised really interesting issues.
11 Terrific job, really, but I'm going to try to give you
12 a decision today that will give us a plan to go
13 forward, all right?

14 MS. NOTEWARE: That would be excellent,
15 Judge.

16 THE COURT: Anything else you want to say?

17 MS. NOTEWARE: I would just say one last
18 thing.

19 THE COURT: Go ahead.

20 MS. NOTEWARE: Also, we wrote to the
21 defendants and suggested that we start talking about
22 settlement, and that was never responded to. I don't
23 know that there's anything that you could do to
24 encourage that at this point but the plaintiffs are --

25 THE COURT: They don't have to respond to

1 settlement. It's a good idea often but this is too
2 complicated right now, I think, until we figure some of
3 this out. Anyway, I understand why they might not
4 respond.

5 Anything else defendant would like to say
6 before I rule?

7 MS. MESSER: Sure. While we appreciate the
8 Court wanting to move the case along and we appreciate
9 the time you've given us today because these are
10 complicated issues, but there are a couple of cases
11 that were cited in our pre-motion letter and I don't
12 know if your Honor has had the opportunity to review
13 them. But I would strongly request the opportunity to
14 put the full rationale and information before the
15 Court, you know, on a motion to dismiss.

16 THE COURT: I will say that my chambers has
17 reviewed everything.

18 MS. MESSER: Okay.

19 THE COURT: I've not laid my hands on every
20 one of these cases but I will say this: All the cases
21 you cite me are other district judges, yes?

22 MS. MESSER: Correct.

23 THE COURT: Yeah, so that's what I teach my
24 law students. I say, that's interesting, I just don't
25 have to listen, right? I can but --

1 MS. MESSEY: Yes. There are no Eastern
2 District decisions out yet, your Honor, so there are
3 motions pending but they just haven't yet been decided.

4 THE COURT: I'll be out there but I'm going
5 to do this orally on the record today. Anyone who
6 wants can order the transcript, although I'm promising
7 you this: It's not going to be that interesting
8 because as interesting as you've made this, there isn't
9 any Second Circuit guidance yet. There are a lot of
10 things but I think we have to just figure out pieces to
11 move this forward, okay, so I'm going to rule on that
12 basis. Now I will proceed to my decision.

13 As set forth in Rule 2(e)(1) of my
14 individual rules, I reserve the discretion to construe
15 the pre-motion letter along with counsels' arguments as
16 the motion itself. As noted in the rule, this
17 procedure has been upheld by the Second Circuit under
18 appropriate circumstances. The exercise of such
19 discretion is rendered more appropriate by the
20 existence of the individual rule, which puts counsel on
21 notice of this possibility. And of course, I brought
22 it up at the beginning of the conference for that
23 reason. I would also add that given the current
24 pandemic, which is not a bad thing to mention in the
25 context of this case, which turns on the pandemic, I do

1 believe that this helps move things along.

2 I will also say I meant what I said.

3 Counsel did a very good job today because you all took
4 something very (ui) and you made it (ui), so
5 congratulations on your work. Let me go forward to
6 make a decision.

7 So of course, the motion, which -- I'm going
8 to construe the motions to dismiss as being made.

9 They're decided under a well-established standard for
10 review of such matters as discussed in so many cases,
11 but I'll give you one as an example: Burrows v. Nassau
12 County District Attorney, 2017 W.L. 9485714 at pages 3
13 to 4, which is a 2017 Eastern District of New York
14 case, which I'm incorporating the standard -- only the
15 standard for deciding a motion to dismiss herein, okay?

16 The Court is required, as everyone knows, to
17 decide, assuming the allegations to be true for the
18 purposes of the motion, whether there are sufficient
19 facts to determine whether the claim is plausible on
20 its face. So based on a review of the complaints and
21 after considering the arguments of counsel, I find that
22 I have different views of the two complaints, as I
23 think I've already made clear. So I will do this in
24 slightly reverse order -- well, not really. I'll just
25 do Stellato first.

1 I'm just going to say that I find that it
2 does state sufficient facts to state a plausible claim
3 as to the breach of contract count or claim. I do
4 believe it's adequately pled in terms of looking at the
5 handbook promises and so forth, that there is a
6 potential breach of contract claim there, so I do
7 believe it's adequately pled. As a result, I would
8 deny the motion to dismiss the breach of contract
9 claim.

10 At the same time, having done that, I would
11 grant the motion as to the unjust enrichment and
12 conversion claims as duplicative, and I believe that is
13 hornbook law. So I'm not going to cite it but I'm
14 fairly confident on that. I would add that I think
15 defense counsel is also right that on the conversion
16 claim -- and I'll bring this up again in a moment --
17 that the funds of course also are not identifiable,
18 they're fungible and so forth. I think there are other
19 grounds on which the conversion claim fails. But I'm
20 going to grant the motion as to unjust enrichment and
21 conversion in Stellato.

22 Migliore presents a very different set of
23 circumstances but I think we'll shortly find ourselves
24 in the same circumstances. I'm going to explain that
25 fully because my goal, counsel, really is to move this

1 as quickly as possible and save everybody money and
2 time on claims. So on Migliore, I will grant the
3 motion as to the breach of contract claim because I do
4 not find sufficient allegations of specific promises
5 that would be actionable here. That said, I have a
6 suspicion, and counsel has indicated such, that they
7 could re-plead that and include such specific
8 allegations, and I'm going to give them the opportunity
9 to do that. I'll come back in a moment as to what the
10 time frame will be on that.

11 That would leave the unjust enrichment claim
12 and the conversion claim. I will similarly dismiss the
13 conversion claim on the grounds that the funds are
14 fungible and not identifiable, and I believe that will
15 not satisfy the requisites as pled for conversion, so
16 I'm going to dismiss conversion as well.

17 But it does leave unjust enrichment and I
18 have to -- I have to deny the motion as to unjust
19 enrichment. What I expect will happen is if counsel
20 amends and they amend in a manner that's similar to
21 Stellato, I will find myself in the same circumstance
22 and I will say that most likely, we will be (ui) to
23 dismiss the unjust enrichment claim as duplicative. I
24 will also add, as I think I foreshadowed today, that in
25 light of the equitable nature of unjust enrichment and

1 in light of what we all know happened during the
2 pandemic and so forth, I don't have a lot of faith in
3 that claim anyway. I don't think we have to go very
4 far on that in any event.

5 So I would like to see the Migliore
6 plaintiffs amend. I will give you one chance to do so.
7 How much time do you need to do that?

8 MR. ZAKARIN: Your Honor, if I could have
9 ten days, your Honor, ten days to two weeks, your
10 Honor. I don't want to delay the proceedings and I
11 don't want to delay the actions but --

12 THE COURT: You know what? Let's give you
13 two weeks, that's fine. But in two weeks, you'll file
14 an amended complaint. And my guess is that if you can
15 bolster up the breach of contract claim, the unjust
16 enrichment claim will become dismissible as
17 duplicative.

18 I want to do that in the fastest way
19 possible and I would urge you to even think about doing
20 that by stipulation or voluntarily or whatever, if you
21 can. I can't force you to do that but I'd urge you to
22 do that so we don't have to do another round of this
23 discussion. In other words, if you think the complaint
24 -- maybe counsel can agree that the complaint would
25 fall within the same bucket as Stellato once amended,

1 right, then we can agree to let the unjust enrichment
2 claim go. But that I will leave up to you all.

3 So that's my ruling. Are there any other
4 issues or anything else I should address today?

5 MS. MESSER: Not for the defendant, Judge.

6 THE COURT: Excellent, thank you.

7 Anything for either plaintiffs?

8 MR. KUROWSKI: Your Honor, this is Daniel
9 Kurowski. Not specifically but with respect to --
10 defendants had requested a stay of discovery. In light
11 of your Honor's order with respect to our case, the
12 stay similarly -- the request for a stay is also
13 denied?

14 THE COURT: Let me hear defendant on that.
15 What do you say?

16 MS. MESSER: Well, we did address some of
17 this with Magistrate Judge Lindsay back in the
18 beginning of January. Just so your Honor is aware, at
19 the time we were required to go through the initial
20 conference and set the discovery schedule, the
21 landscape in these cases -- it was in its infancy.

22 THE COURT: Yeah.

23 MS. MESSER: That's the reason that we
24 entered into --

25 THE COURT: Right. So what I'm going to do

1 is, I'm going to defer on that issue. When and in what
2 form discovery -- I don't have an opinion. I really
3 don't -- should continue at this point and whether once
4 we kind of get the cases settled as to what they would
5 look like, which we should do in the next few weeks,
6 whether discovery should be focused in one way or the
7 other, I'm going to leave that all to Judge Lindsay in
8 the first instance. Let her decide and then you take
9 whatever other steps you need, all right?

10 MR. KUROWSKI: Understood, thank you.

11 THE COURT: All right. In the meantime,
12 everyone wear your masks, wash your hands, stay safe,
13 get your shots, whatever. Hopefully, next time we do
14 this, we can do it in person. But I will emphasize
15 once again, counsel, you did a fine job today. Thank
16 you for that and we'll talk soon, okay?

17 MS. MESSER: Thank you, Judge.

18 MR. ZAKARIN: Thank you, your Honor.

19 MR. KUROWSKI: Thank you, your Honor.

20 THE COURT: All right, we are adjourned.

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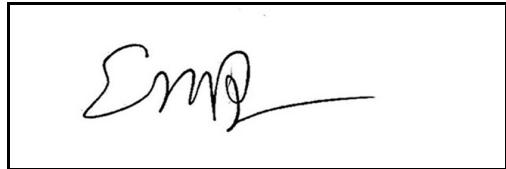
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I certify that the foregoing is a correct
transcript from the electronic sound recording of the
proceedings in the above-entitled matter.

A rectangular box containing a handwritten signature in black ink. The signature appears to read "EMP" followed by a cursive surname.

ELIZABETH BARRON

April 16, 2021